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SUBRAMANIAM MARGISER

v.

ESSO (M) BHD.

HIGH COURT MALAYA, SEREMBAN

MUSTAPHA HUSSAIN J

b

[CIVIL SUIT NO. 99 OF 1981]

25 JANUARY 1990

c

LABOUR LAW: Termination - Lawful acts - Breach of implied terms of employment - Inability to report to duty not self - imposed - Detention at Pulau Jerejak under Emergency Law - Doctrine of frustration - Commercial viewpoint - Length of absence from work - Wrongful dismissal - Quantum of damages.

The plaintiff was employed as a process technician by the defendant company from 1963 for RM900 per month.

On 16 June 1977, the plaintiff was detained by the police under the Emergency (Public Order and Prevention of Crime) Ordinance No. 5 of 1969.

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During his detention, the plaintiff and his brother wrote letters to the defendant explaining the plaintiff's plight and pleaded that he be allowed to resume employment after serving his 2 year detention.

Despite that, the defendant informed him by letter that since he failed to report for duty on 23 August 1977 as ordered to by letter on 12 July 1977, he had breached his contract of service and he had thereby terminated his service with the defendant.

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The question for determination of the Court is whether the termination of employment of the plaintiff in the circumstances of the case is wrong in law.

Held:*f*

[1] In their submission, the defendant raised the defence of frustration. However since the service was terminated on the ground of being absent from work on a specific date and since this absence was forcefully imposed by law, the defence of frustration cannot be sustained at this later stage. Consequently, the plaintiff was wrongfully dismissed and the employer was in breach of contract.

[2] The amount of damages is confined to losses of earnings which plaintiff would have earned but for the breach of contract, up until the time he found other employment.

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[Judgment for the plaintiff.]

Cases referred to:

Hare v. Murphy Brothers [1974] 3 All ER 940

Chakki v. United Yeast Co. Ltd. [1982] 2 All ER

Calcutta Dock Labour Board v. Jaffar Iman [1966] AIR SC 282

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Calcutta Dock Labour Board v. Employers [1973] AIR SC 2251

S.R. Fox v. Ek Liong Hin Ltd. [1957] MLJ 1

D'Cruz v. Seafield Amalgamated Rubber Co. Ltd. [1963] MLJ 154

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.

For the defendant - Ambiga Sreenevasan; M/s. Skrine & Co.

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JUDGMENT

Mustapha Hussain J:

The plaintiff Subramaniam was in the employment of the defendant as a process technician at the defendant's Refinery at Port Dickson from 1963 earning about RM900 per month.

On 16 June 1977 the plaintiff was detained by the police under the Emergency (Public Order and Prevention of Crime) Ordinance No. 5 of 1969. Plaintiff's brother on behalf of the plaintiff wrote to the defendant requesting two months' leave to which the defendant replied on 23 June 1977 asking the plaintiff to be contacted and the plaintiff to write and give reasons.

Plaintiff was held *incommunicado* and only on 29 June 1977 plaintiff's brother was allowed to see the plaintiff. On the same day plaintiff wrote to the defendant saying he was detained by the police for reasons which were not clear to him and asked the defendant to place him on a no pay leave during his detention.

Order of detention by the Home Minister placed the plaintiff in Pulau Jerejak for two years commencing 14 August 1977.

While the plaintiff was in detention at Pulau Jerejak, the defendant wrote a letter dated 12 July 1977 requesting the plaintiff to report for duty on the 4 p.m. to 12 p.m. shift on 23 August 1977. The plaintiff replied on 16 August 1977 to the defendant explaining his plight and about the detention and pleaded that he be allowed to resume employment after serving his two year detention. Then the defendant wrote by letter dated 30 August 1977 that since the plaintiff having failed to report for duty on 23 August 1977, the plaintiff had breached his contract of service and he himself had thereby terminated his service with the defendant.

The plaintiff's brother wrote a letter dated 28 September 1977 to the Director of Industrial Relations, Negeri Sembilan, Seremban, explaining the circumstances and asked the Director to intercede in the matter, but to no avail.

Thus, the above are the facts of the case. One thing is very clear here. The plaintiff due to his detention by the police was unable to report for duty to the defendant. His inability was not self imposed.

The question for determination of the Court is whether the termination of employment of the plaintiff in the circumstances of the case is wrong in law.

It is the contention of the defendant that as the plaintiff had failed to report for duty on 17 June 1977, the plaintiff had breached the implied terms of employment and hence the defendant was entitled to treat the plaintiff's contract of employment as determined by plaintiff's own conduct.

It is the contention of the plaintiff that he was physically unable to turn up for work as he was under detention by the police under an Emergency law but had done everything possible to write in letters pleading that he could not attend work and applying for no pay leave and stating that he would resume work after his release from detention.

In the very lengthy submissions by both parties, the defendant raised the issue of **Frustration**.

Authorities were cited but reliance was placed on the case of *Hare v. Murphy Brothers* [1974] 3 All ER 940, where the sentence of imprisonment was for twelve months and the Court held that the contract was frustrated. On the other hand in *Chakki v. United Yeast Co. Ltd.* [1982]

- a** 2 All ER where the imprisonment was only for 24 hours, the Court held the contract was not necessarily frustrated immediately from date of sentence. The Court suggested before deciding on the issue of frustration, one should look from the commercial point of view as to whether a replacement has to be engaged, in view of the length of absence from work. Since the plaintiff here was detained for two years and was placed on restriction for a further period of six months, it is the contention of the defendant based on *Hare v. Murphy Brothers* that the contract of employment of the plaintiff was frustrated.
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On the other hand, the plaintiff contends that the plaintiff was physically unable to report for work and that before the defendant terminated his contract of employment, there should at least be an enquiry - relying on *Calcutta Dock Labour Board v. Jaffar Iman* [1966] AIR SC 282 and *Workmen, Calcutta Dock Labour Board v. Employers* [1973] AIR SC 2251.

- c** Going through the correspondence as agreed in the bundle, defendant's letter dated 30 August 1977 clearly stated that since the plaintiff had failed to report for duty on the 4 p.m x 12 p.m. shift on 23 August 1977, which he was required to do so by letter dated 12 July 1977, the contract was terminated.

- d** What this means is that the plaintiff's contract was terminated on the ground of being absent or in other words on the ground of plaintiff's conduct. Nowhere was there mention anything about "frustration". Although in the statement of defence it is averred as a ground to terminate.

- e** It is an unfortunate case where the plaintiff had not only lost a few years of freedom but also he lost his livelihood. He simply could not be present for work on 23 August 1977 and he himself informed the defendant. Since the service was terminated on the ground of being absent from work on 23 August 1977 and that his absence was not self imposed but forcefully imposed by law, the defence of "frustration" which was not the reason when the plaintiff's employment was terminated cannot be sustained at this late stage. The defendant knew all along that the plaintiff simply could not be present. Defendant knew plaintiff was under detention. Defendant should, right from the beginning have said so.

- f** The Court therefore rules that the ground (i.e., absence from duty) is not tenable and hence the plaintiff was wrongfully dismissed and therefore the defendant was in breach of contract.

- g** The plaintiff here is not a musician who had contracted to play the piano at night and who was drafted into the army; nor was he under a contract to write a book, and became mad - where the contract was indeed frustrated. Here we have the plaintiff working since 1963 and was hauled up by the police and detained under an Emergency law. He simply could not be present at his work.

- h** Since there was an order of Court dated 13 May 1983, there is only the question of damages for breach of contract to be awarded to the plaintiff. The amount of damages, following *S.R. Fox v. Ek Liong Hin Ltd.* [1957] MLJ 1 and *D'Cruz v. Seafield Amalgamated Rubber Co. Ltd.* [1963] MLJ 154, is confined to the loss of earnings which plaintiff would have earned but for the breach of the contract, to the time when he could find another employment. This boils down to how many months notice the plaintiff was entitled to and should have been given. He did obtain a job getting RM400 to RM500 per month to mitigate the damage.

Plaintiff's eventual release from detention and restriction was on 24 February 1980, when he was physically able to continue work.

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Accordingly the Plaintiff is entitled to three months' notices in lieu RM900 x 3 = RM2,700. plaintiff is also entitled to the RM900 per month less RM400 (taking the lower figure than RM500) per month from the date of release from restriction i.e., in February 1980 till filing of his writ on 2 June 1981 amounting to RM500 x 16 months = RM8,000.

Therefore judgment for the plaintiff as follows:

- (1) Damages for wrongful dismissal RM10,700 with interest at 4% per annum from 24 February 1980, and
- (2) Costs.

Unfortunately there was an order of Court dated 13 May 1983, otherwise the plaintiff would have been awarded on the other items.

Also found at [1990] 2 CLJ 100

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